

This Opinion is not a
Precedent of the TTAB

Mailed: December 5, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Hines Nut Company, Ltd.

Serial No. 90672644

Kirby B. Drake of Kirby Drake Law PLLC,
for Hines Nut Company, Ltd.

Shari Gadson, Trademark Examining Attorney, Law Office 120,
Joshua Toy, Managing Attorney.

Before Goodman, Heasley, and Allard,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Applicant, Hines Nut Company, Ltd., seeks registration on the Principal Register of the mark CREME DE LA CREME (in standard characters) for “Blanched nuts; Candied nuts; Chopped nuts; Flavored nuts; Prepared nuts; Processed nuts; Roasted nuts; Seasoned nuts; Shelled nuts, all of which are supplied to grocery chains and wholesale grocers” in International Class 29 and “Fresh nuts; Raw nuts, all of which are supplied to grocery chains and wholesale grocers” in International Class 31.¹

¹ Application Serial No. 90672644 was filed on April 26, 2021, based on a declared intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

The Examining Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as used in connection with these goods, so resembles the mark CRÈME DE LA CRÈME (registered on the Supplemental Register in standard characters) for "candy" in International Class 30, as to be likely to cause confusion, to cause mistake, or to deceive.²

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal proceeded. We affirm the refusal to register.

I. Likelihood of Confusion

Section 2(d) of the Trademark Act provides that a mark may be refused registration if it:

[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive....

15 U.S.C. § 1052(d), *quoted in In re Charger Ventures LLC*, 64 F.4th 1375, 2023 USPQ2d 451, *2 (Fed. Cir. 2023).

To determine whether there is a likelihood of confusion between marks under

Citations to the prosecution file refer to the USPTO's Trademark Status & Document Retrieval ("TSDR") system and identify the documents by title, date, and page in the downloadable .pdf version. Citations to the briefs and other materials in the appeal record refer to the Board's TTABVue online docket system.

² Registration No. 2932060 issued on the Supplemental Register on March 8, 2005, renewed. The Registration includes a translation statement that "[t]he English translation of the word 'crème de la crème' is 'the very best'."

Section 2(d), we analyze the evidence and arguments under the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (the “*DuPont* factors”) cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 135 S. Ct. 1293, 113 USPQ2d 2045, 2049 (2015). “Whether a likelihood of confusion exists between an applicant’s mark and a previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1689 (Fed. Cir. 2018). We consider each *DuPont* factor for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019). “The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.” *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (internal punctuation omitted).

A. Strength or Weakness of the Cited Registered Mark

Although the Examining Attorney is not expected to adduce evidence of the strength or fame of the cited registered mark, *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1086 (TTAB 2016), an applicant may adduce evidence of “[t]he number and nature of similar marks in use on similar goods” under the sixth *DuPont* factor, *DuPont*, 177 USPQ at 567, to show that the cited mark is comparatively weak, conceptually or commercially, and has a “comparatively narrower range of protection.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d

1671, 1674 (Fed. Cir. 2015) *quoted in Monster Energy Co. v. Lo*, 2023 USPQ2d 87, *19 (TTAB 2023).

Applicant here submits that “[t]he strength of the Cited Mark is conceptually weak. This is indicated at least insofar as the Cited Mark was initially registered (and continues to reside) on the Supplemental Register,” because CRÈME DE LA CRÈME means “something superlative,” and is “laudatory of the quality of the goods. Further, the phrase ‘crème de la crème’ is widely used with variations, making confusion between the goods associated with the Cited Mark and the Applied-For Mark unlikely.”³ Due to this conceptual weakness, Applicant concludes, the cited registered mark is entitled to a comparatively narrow range of protection, and “confusion is unlikely at least because of the differences in the goods to which [the marks] are applied.”⁴

We note that Applicant has adduced no third-party use or registration evidence in support of this argument. *See In re Cook Medical Tech. LLC*, 105 USPQ2d 1377, 1383 (TTAB 2012) (no third-party use or registration evidence); *Monster Energy v. Lo*, 2023 USPQ2d 87, at *30 (record “bereft of evidence” of third-party use). Its assertion that “‘crème de la crème’ is widely used with variations” is just that: an assertion unsupported by evidence. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (“Attorney argument is no substitute for evidence.”) *cited in In re Mission Am. Coalition*, 2023 USPQ2d 228, *11 (TTAB 2023). Applicant relies

³ Applicant’s brief, 8 TTABVUE 2-3.

⁴ *Id.* at 3.

on the cited mark's registration on the Supplemental Register as evidence that it is laudatory, descriptive, and conceptually weak.

It is true that marks are registered on the Supplemental Register if they are “capable of distinguishing the applicant’s goods or services and not registrable on the principal register....” 15 U.S.C. § 1091(a), *quoted in Matal v. Tam*, 582 U.S. 218, 137 S.Ct. 1744, 122 USPQ2d 1757, 1761 (2017). *See Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1373 n.3 (Fed. Cir. 2018) (a mark that is ineligible for registration on the Principal Register because it is merely descriptive may be registered on the Supplemental Register if it is capable of distinguishing the applicant’s goods or services, even though it has not yet acquired distinctiveness). Indeed, “[r]egistration on the Supplemental Register is prima facie evidence that, at least at the time of registration, the registered mark was merely descriptive,” *In re Highlights for Children, Inc.*, 118 USPQ2d 1268, 1272-73 (TTAB 2016), although it is not an admission that the mark has not acquired distinctiveness. 15 U.S.C. § 1095. On the whole, “[i]t is well-established that a mark registered on the Supplemental Register would be categorized as weak....” *In re Medline Indus., Inc.*, 2020 USPQ2d 10237, *7 (TTAB 2020).

It is also true that “CRÈME DE LA CRÈME” may be characterized as laudatory. According to the MERRIAM WEBSTER dictionary, “crème de la crème” (“cream of the cream” in French) means “the very best.”⁵ There are, however, gradations of

⁵ Merriam-webster.com 11/30/2023. The Board may *sua sponte* take judicial notice of dictionary definitions from online sources when the definitions are derived from dictionaries

laudation. For example, “THE BEST BEER IN AMERICA” was so laudatory that it was “incapable of registration as a trademark” for beer. *In re Bos. Beer Co.*, 198 F.3d 1370, 53 USPQ2d 1056, 1058-58 (Fed. Cir. 1999). But “DELUXE” was found capable of serving as a trademark for canned pork and beans, and thus registrable on the Supplemental Register. *In re Bush Bros. & Co.*, 884 F.2d 569, 12 USPQ2d 1058, 1059 (Fed. Cir. 1989).

In this case, as in *Bush Bros.*, even though the cited mark is somewhat laudatory, it nonetheless was found capable of serving as a trademark for candy, and thus registered on the Supplemental Register. “It is well-settled that marks registered on the Supplemental Register are ‘marks registered in the Patent and Trademark Office’ under Section 2(d) of the Trademark Act.” *Otter Prods. LLC v. BaseOneLabs LLC*, 105 USPQ2d 1252, 1254-55 (TTAB 2012). Such marks may be cited as a basis for an ex parte refusal to register under Section 2(d). *See generally In re Clorox Co.*, 578 F.2d 305, 198 USPQ 337, 341 (CCPA 1978) (“We conclude, therefore, that a mark registered on the Supplemental Register can be used as a basis for refusing registration to another mark under § 2(d) of the Act.”); *accord In re Research & Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 49 (Fed. Cir. 1986); *Towers v. Advent Software, Inc.*, 913 F.2d 942, 16 USPQ2d 1039, 1042 (Fed. Cir. 1990) (discussing difference between ex parte and inter partes treatment); *Medline*, 2020 USPQ2d 10237, at *3 (quoting *Otter Prods.*, 105 USPQ2d at 1254: “a mark on the

that exist in printed form or have regular fixed editions. *In re Zuma Array Ltd.*, 2022 USPQ2d 736, *12 & n.18 (TTAB 2022).

Supplemental Register can be cited as a basis for refusing registration to another mark under Section 2(d) of the Act.”).

“In the ex parte context, the Office does not and cannot question the validity of a mark in a registration cited against another under Section 2(d).” *Otter Prods.*, 105 USPQ2d at 1256. “[W]e must assume that the [mark] shown in the cited Supplemental Register registration is capable of functioning as a mark for purposes of its citation against Applicant’s claimed mark....” *Medline*, 2020 USPQ2d 10237, at *6 (citing *Otter Prods.*, 105 USPQ2d at 1256).

The Board traced the Federal Circuit’s protection of Supplemental Register registrations in *In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738 (TTAB 2016) ultimately finding that such registrations are enforceable under Section 2(d), despite the registered marks’ presumed conceptual weakness:

In *Research and Trading*, the Federal Circuit further observed that “[i]t is not material whether or not registration on the Supplemental Register implies that there is a degree of descriptiveness to that mark. . . . Such registration may be cited under section 2(d) in a determination of likelihood of confusion, an inquiry separate from that of descriptiveness. 230 USPQ at 49 And in *Towers*, 16 USPQ2d at 1042, the Court confirmed the *Clorox* rule that “likelihood of confusion can be found even if a term is merely descriptive and does not identify source: Registration on the Supplemental Register is sufficient, and a showing of trade identity rights in the form of secondary meaning is unnecessary.”

* * *

Most marks are on the Supplemental Register because they are descriptive, and the weaker the mark on the fanciful to generic continuum, the less its ability to preclude registration of a similar mark under Section 2(d). *Id.* (citing *Clorox*, 198 USPQ at 341). But there is no categorical rule that citation of registrations on the Supplemental Register is limited to registrations of “‘substantially identical’ marks for ‘substantially similar goods,’” or that a different test for likelihood of confusion should be applied in such cases.”

Id. at 1743-44.

In accordance with this decisional law, we find under the sixth *DuPont* factor that the cited mark is laudatory and conceptually weak, but is still presumed valid and enforceable under Section 2(d).

B. Similarity of the Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's and Registrant's marks in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) *aff'd* 777 Fed. Appx. 516 (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)).

Even though Applicant stresses the cited registered mark's conceptual weakness, it does not argue that relevant purchasers would distinguish the marks based on their dissimilarity. Instead, it argues that in view of this weakness, confusion is unlikely due to differences in the goods and channels of trade (an argument we address below).⁶ "Apparently conceding the issue, Applicant did not address [the first *DuPont* factor] in its brief, so we offer only a brief explanation of our conclusion." *In re OSF*

⁶ Applicant's brief, 8 TTABVUE 3.

Healthcare System, 2023 USPQ2d 1089, *2 (TTAB 2023) (quoting *Morinaga*, 120 USPQ2d at 1740). Here, the marks are virtually identical.

The marks consist of the same wording, CREME DE LA CREME and CRÈME DE LA CRÈME. Both have the same structure and cadence. See *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018). And both are in standard characters, so they may be displayed in the same manner. *OSF Healthcare*, 2023 USPQ2d 1089, at *2.

The marks differ only in Applicant's omission of accent marks. This difference is so subtle that it is likely to pass unnoticed. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012) (“[A]ny minor differences in the sound of these marks may go undetected by consumers and, therefore, would not be sufficient to distinguish the marks.”). And even if this slight difference in accentuation is noticed, it is likely to be perceived as mere filigree, as a variant display of the same mark. Cf. *Peterson v. Awshucks SC, LLC*, 2020 USPQ2d 503435, *15-16 (TTAB 2020) (“Punctuation, such as quotation marks, hyphens, periods, commas, and exclamation marks, generally does not significantly alter the commercial impression of the mark.”). “Even those purchasers who are fully aware of the specific differences between the marks may well believe, because of the similarities between them, that the two marks are simply variants of one another, used by a single producer to identify and distinguish companion lines of goods.” *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985).

For these reasons, we find that the marks are very similar, and the first *DuPont* factor weighs in favor of finding a likelihood of confusion.

C. Relatedness of the Goods and Channels of Trade

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration...,” and the third *DuPont* factor concerns the “similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567; *Stone Lion Cap. v. Lion Cap.*, 110 USPQ2d at 1161.

Again, Registrant’s goods are “candy” and Applicant’s goods are “Blanched nuts; Candied nuts; Chopped nuts; Flavored nuts; Prepared nuts; Processed nuts; Roasted nuts; Seasoned nuts; Shelled nuts, all of which are supplied to grocery chains and wholesale grocers” and “Fresh nuts; Raw nuts, all of which are supplied to grocery chains and wholesale grocers.”

Applicant argues that “the Cited Mark is a weaker mark that should only be entitled to limited protection, and confusion is unlikely at least because of the differences in the goods to which they are applied.”⁷ Expanding on this argument, Applicant posits that “the examining attorney has not cited any third-party registrations that would serve to suggest that the goods associated with the Applied-For Mark and the Cited Mark are of a type which may emanate from a single source.”⁸

⁷ Applicant’s brief, 8 TTABVUE 3.

⁸ *Id.*

The Examining Attorney, however, cited nine third-party websites—LaurasCandy.com,⁹ NutsToYou.com,¹⁰ SwissColony.com,¹¹ HarryandDavid.com,¹² OliveandCocoa.com,¹³ OhNuts.com,¹⁴ NassauCandy.com,¹⁵ RoyalWholesaleCandy.com,¹⁶ and WeaverNut.com¹⁷—showing the same entities offering candy and nuts under the same mark.¹⁸ *See, e.g., Detroit Athletic Co.*, 128 USPQ2d at 1051 (relatedness supported by evidence that third parties sell both types of goods under same mark, showing that consumers are accustomed to seeing a single mark associated with a source that sells both); *In re Embiid*, 2021 USPQ2d 577, *28-29 (TTAB 2021) (webpages from three clothing companies that offer shoes, shirts, or sweat shirts under the same mark “is evidence that consumers are accustomed to seeing shoes and clothes sold under the same mark”).

Applicant argues that “while it may be possible that candy (the goods associated with the Cited Mark) and nuts (the goods associated with the Applied-For Mark) could be sold in the same place as in this Internet evidence, the Internet evidence

⁹ January 3, 2022 Office Action, TSDR 7-11.

¹⁰ January 3, 2022 Office Action, TSDR 12-17

¹¹ January 3, 2022 Office Action, TSDR 18-23.

¹² August 8, 2022 Office Action, TSDR 8-9.

¹³ August 8, 2022 Office Action, TSDR 10-12.

¹⁴ August 8, 2022 Office Action, TSDR 13-14; February 27, 2023 Office Action, Denial of Request for Reconsideration, TSDR 14-20.

¹⁵ February 27, 2023 Office Action, Denial of Request for Reconsideration, TSDR 4-6.

¹⁶ February 27, 2023 Office Action, Denial of Request for Reconsideration, TSDR 7-9.

¹⁷ February 27, 2023 Office Action, Denial of Request for Reconsideration, TSDR 10-13.

¹⁸ Examining Attorney’s brief, 10 TTABVUE 7.

focused on nuts that are covered in chocolate or sold in connection with chocolate, such as with Laura’s Candies & Nuts. In fact, the search focused on chocolates resulting in chocolate peanuts, for example, or candies containing nuts.”¹⁹

However, the subject Application identifies “candied nuts,” among other kinds of nuts in Class 29. Similarity of any item identified in a Class supports a finding of confusing similarity as to that entire class. *Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, *44-45 (TTAB 2022) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)). And the third-party evidence also shows single sources offering candy on the one hand and plain, raw, uncandied nuts on the other, under a single mark.²⁰

Applicant argues that it amended its identification of goods to narrow its channels of trade to nuts “supplied to grocery chains and wholesale grocers.”²¹ It argues that Registrant, in contrast, sells candy bearing its cited mark solely for fundraising purposes, “and thus, a consumer searching for products in connection with the Cited Mark would not come across the applied-for mark where the goods are sold wholesale/retail.”²²

Applicant acknowledges, however, that the cited Registration does not include any

¹⁹ Applicant’s brief, 8 TTABVUE 4.

²⁰ *E.g.*, LaurasCandy.com, January 3, 2022 Office Action, TSDR 7-11; HarryandDavid.com, August 8, 2022 Office Action, TSDR 8-9, WeaverNut.com, February 27, 2023 Office Action, Denial of Request for Reconsideration, TSDR 10-13.

²¹ Applicant’s brief, 8 TTABVUE 5.

²² *Id.*

limiting language as to trade channels.²³ “The third *DuPont* factor—like the second factor—must be evaluated with an eye toward the channels specified in the application and registration, not those as they exist in the real world.” *In re Detroit Athletic Co.*, 128 USPQ2d at 1052 (citing *i.am.symbolic*, 123 USPQ2d at 1749). “It is well established that the Board may not read limitations into an unrestricted registration or application.” *In re Country Oven, Inc.*, 2019 USPQ2d 443903, *5 (TTAB 2019).²⁴ Absent limitations in the cited registration, we presume that Registrant’s candy goods move in all channels of trade normal for such goods and are available to all the usual prospective purchasers of goods of that type. *See In re Dare Foods Inc.*, 2022 USPQ2d 291, *7 (TTAB 2022).

Applicant’s limitation in its identification of goods does not avoid an overlap with Registrant’s channels of trade or classes of customers. Registrant’s candies, like Applicant’s nuts, could be “supplied to grocery chains and wholesale grocers.” From

²³ *Id.* at 7.

²⁴ Applicant argues that the evidence adduced by the Examining Attorney in denying Applicant’s request for reconsideration does not show the four third-party entities marketing their goods to grocery chains and wholesale grocers, as set forth in Applicant’s identification of goods. *See* Applicant’s brief, 8 TTABVUE 5-6. That argument, however, misses the point. The third-party evidence shows that Applicant’s and Registrant’s goods are often sold by the same source under the same mark. The channels of trade are determined by reference to Applicant’s and Registrant’s identification of goods. Since the cited Registration is unrestricted, its channels of trade overlap Applicant’s, and cannot be so narrowed by extrinsic evidence. The third-party websites are extrinsic evidence that illustrates, but does not limit, the available channels of trade. For example, Nassau Candy states that it supplies “many of the national retailers and independent stores across the country. ... [W]e develop private label creations for clubs, department stores, specialty retailers, drugstore, and specialty grocery chains,” and Weaver Nut Company states that it ships “to retail stores, mom & pop shops, farmers markets, jobbers, regional distributors, food service, restaurants, manufacturers, institutions and non-profits.” Feb. 27, 2023 Office Action, denial of Request for Reconsideration, TSDR 4, 10.

there, both sorts of goods would be sold, in turn, to the general public. “The confusion referred to in section 2(d) is that of purchasers in the marketplace where the marks are used.” *In re Research & Trading Corp.*, 230 USPQ at 50 (citing *Clorox Co.*, 198 USPQ at 340). We consider confusion by end purchasers, as well as intermediate wholesalers and retailers, such as grocery chains. *See In re Medline Indus., Inc.*, 2020 USPQ2d 10237, at *8 n.31.

The second and third *DuPont* factors thus weigh in favor of a likelihood of confusion.

II. Conclusion

On consideration of all relevant arguments, evidence, and applicable law, we find the cited registered mark CRÈME DE LA CRÈME conceptually weak. Nonetheless, we find it very similar to the applied-for mark, CREME DE LA CREME, for related goods that would travel through overlapping channels of trade. On balance, we find a likelihood of confusion under Section 2(d), 15 U.S.C. § 1052(d). *See Charger Ventures*, 2023 USPQ2d 451, at *7.

Decision: The refusal to register Applicant’s mark is affirmed.